STATE OF SOUTH CAROLINA	)	**BEFORE THE SOUTH CAROLINA PROCURMENT REVIEW PANEL**
	)	
COUNTY OF RICHLAND	)	
		CASE NO. 2003-2
In re: Graduate Science Research Facility at the University of South Carolina	)	
	)	**ORDER**
Protest of M.B. Kahn Construction Co. and Atlantic Coast Mechanical, Inc.	)	
	)	
Appeal of M.B. Kahn Construction Co. and Atlantic Coast Mechanical, Inc.	)	

This matter came before the South Carolina Procurement Review Panel (Panel) for a hearing on September 18, 2003. The Panel heard an appeal by M.B. Kahn Construction Co. (Kahn) and Atlantic Coast Mechanical Inc. (ACM) of the April 21, 2003, decision of the Chief Procurement Officer for Construction (CPOC). In his order, he dismissed ACM finding a lack of subject matter jurisdiction and he also granted summary judgment to the University of South Carolina (USC). The CPOC held the case should be dismissed because he found ACM was not a real party in interest. Accordingly, he found §11-35-4230 does not apply to ACM and he, therefore, has no subject matter jurisdiction. In granting summary judgment, he found that ACM can only pursue whatever claims Kahn could have pursued. He found that Kahn has no claims because ACM has released Kahn from all liability.

Present at and participating in the hearing before the Panel were: W. Duvall Spruill, Esquire, counsel for ACM; Robert T. Strickland, Esquire, counsel for M.B. Kahn; Henry P. Wall, Esquire, counsel for the University of South Carolina; and Keith C. McCook, Esquire, counsel for the Chief Procurement Officer for Construction.

MOTION TO DISMISS

The CPOC moved before us to dismiss Kahn's appeal arguing that Kahn lacked standing. Specifically, the CPOC argues that Kahn's Request for Resolution has not been dismissed and Kahn is not aggrieved. We disagree. While Kahn's claim technically may still be pending before the CPOC, it in effect has been dismissed by the order of the CPOC regarding ACM. The issues as to Kahn are completely inextricable with the issues regarding ACM. We find that Kahn has standing to participate in the case before us.

EXHIBITS

The parties did not offer testimony at the hearing. The Record from the CPOC was amended to include USC's Memorandum in Support of the Motion for Judgment as a Matter of Law and USC's Reply Brief which were inadvertently omitted from the CPOC's Record when it was sent to the Panel. The Record was admitted into evidence as amended. Also, a six-page document beginning "Table of Contents" was admitted after being offered by ACM without objection.

FINDINGS OF FACT

On April 21,1997, Kahn entered into a contract with USC for the construction of the Graduate Science Research Center. Subsequently, Kahn subcontracted with ACM for the plumbing and mechanical work. During the course of the project, disputes arose among the parties. In April 1999, ACM submitted notice of claims to Kahn for eight specific issues. Kahn forwarded these claims to a representative of USC. In September 1999, ACM submitted a revised claim for 14 items for a total claim of $228,000.

On December 10, 1999, Kahn and ACM entered into an agreement they titled

"Agreement Regarding Pursuit of Claim and Covenant Not to Sue." In the agreement, ACM agreed not to sue Kahn for claims it had against USC. Further, Kahn agreed to assist ACM in bringing its claims against USC. On December 21, 1999, Kahn submitted a Request for Resolution to the Chief Procurement Officer for Construction (CPOC) based on ACM's claims.

On August 1, 2001, Kahn and USC entered into a Settlement Agreement. Paragraph 7 of the Settlement Agreement states in part,

> USC acknowledges that claims of M.B. Kahn's subcontractors and suppliers concerning the Project, if any, may be pursued directly against USC in M.B. Kahn's name under the South Carolina Consolidated Procurement Code. Nothing in this Settlement Agreement shall be construed as releasing, prohibiting or in any way prejudicing any claim of any type that a subcontractor or supplier of M.B. Kahn may have against USC.

On January 11, 2002, ACM filed a separate document with the CPOC in which it asserted that it was the real party in interest.

CONCLUSIONS OF LAW

Based upon the Findings of Fact, we conclude the following as a matter of law:

Subject-Matter Jurisdiction

The first question before us is the question of whether there is subject matter jurisdiction over ACM's claims being that ACM is a subcontractor. The CPOC found that: since there was no privity of contract between ACM and USC, ACM could not be a real party in interest; since ACM is not a real party in interest, the limited waiver of sovereign immunity of §11-35-4230 does not apply; and thus, the CPOC lacked subject matter jurisdiction over the claims. We conclude this was erroneous.

The CPOC correctly held that a state can only be sued in a manner and upon such terms as expressly allowed by law. Order of the CPOC, pg. 4 (Record, pg.8)(citing Unisys Corp. vs. South Carolina Budget and Control Board, 551 S.E.2d 263 (2001). The law at issue in this case is S.C. Code Ann. §11-35-4230. The statute grants jurisdiction to the CPOC to hear contract controversies involving the State and it provides in part,

> This section applies to controversies between the State and a contractor or subcontractor **when the subcontractor is the real party in interest**, which arise under or by virtue of a contract between them including, but not limited to, controversies based upon breach of contract, mistake, misrepresentation, or other cause for contract modification or recision. (emphasis added)

At very important issue in this case is the meaning of the phrase "real party in interest." Obvious from the statute cited above is the requirement that a subcontractor be the real party in interest for the section to apply and thus for the State to be subject to suit by a subcontractor. "Real party in interest" has been defined by the courts in South Carolina as, "one who has a real, material, or substantial interest in the subject matter of the action, as opposed to one who has only a nominal or technical interest in the action." Sea Pines Association for Protection of Wildlife, Inc. vs. South Carolina Department of Natural Resources, 345 S.C. 594, 600, 550 S.E. 2d 287, 291 (2001); Charleston County School District vs. Charleston County Election Commission, 519 S.E.2d 567, 571, 336 S.C. 174, 181 (1999)(quoting Anchor Point, Inc. vs. Shoals Sewer Co., 308 S.C. 422, 428, 418 S.E. 2d 546, 549 (1992). We do not believe this definition was meant to be limited in the statute. The CPOC says that because ACM lacks privity of contract with USC that there is no substantive right under the common law of contracts to bring an action against USC and that is what determines a real party in interest. However, we have to look at the law the courts in South Carolina have given us. We need not turn to the

common law of contracts when we have before us a statute and numerous cases defining terms used in a statute applicable to the case.

The CPOC found this statute was never meant to grant all subcontractors the right to bring claims against an owner. Instead, he says, it is meant to apply only to certain contractors such as subcontractors who have been assigned rights from the contractor. However, the legislature did not make those delineations and it certainly could have had it meant to limit subcontractor claims to certain areas. We agree that the statute does not allow all subcontractors to bring claims. The statute reads that a subcontractor may pursue the claim only when it is the real party in interest. However, to attempt to distort the meaning of real party in interest would not be logical. We can only assume that the legislature intended to define real party in interest as our courts had defined it. We find it difficult to imagine a situation in which a subcontractor could be anymore a real party in interest.

The Panel is sensitive to the concerns of the State and does not want to unnecessarily or inadvertently expand the consent to sue beyond that provided in the statute. However, here it is incongruous to argue that ACM is not a real party in interest when all parties had notice and made representations that ACM could continue to make claims against USC. Under these facts, with these consents and representations, there was no question that the subcontractor was a real party in interest and we have no choice but to interpret the statute as permitting ACM to bring the claim. Otherwise, the stature would have no or a contorted meaning.

Summary Judgment

We agree with CPOC to the extent that he finds the claims arise out of a contract between the contractor and subcontractor. The definitions of the procurement code are found at S.C. Code Ann., §11-35-310. A "contractor" means any person having a contract with a governmental body.

A "subcontractor" is defined by that section as, "...any person having a contract to perform work or render service to a prime contractor as a part of the prime contractor's agreement with a governmental body." It is clear that any claim the subcontractor could have against the owner would have to arise out of the contract between the contractor and the owner. Because of this, the CPOC's order found that,

> [u]nder the common law of contracts, the subcontractor's derivative claims against the owner are limited to what the prime contractor could itself recover against the owner. It is axiomatic that, as a general rule, a party can only recover for damages suffered by that party. If the prime contractor has no liability to the subcontractor for the subcontractor's damages, then the subcontractor's damages are not actual damages of the prime contractor.
>
> Order of the CPOC, pg. 7 (Record, pg. 11)

However, as stated above, we do not need to look to the common law of contracts in South Carolina. South Carolina has the benefit of a statute that was enacted by the legislature to address the issue of subcontractors at least as to contracts entered into by the State.

USC and the CPOC argued before us the Severin Doctrine should apply to this matter. Severin vs. United States, 99 Ct.Cl. 435 (1943) stands generally for the proposition that when a subcontractor fully releases a general contractor from liability, neither the general contractor nor the subcontractor may pursue a claim against the owner. The parties argue over its meaning. ACM and Kahn argue Severin is not the law in South Carolina, but that even if it was, that the pass through of the money, if any, from USC to Kahn to ACM survives the Severin Doctrine because there is some obligation on the part of Kahn. Nevertheless, we do not believe we need to address Severin to decide this matter. We agree that Severin has not been recognized by the courts in South Carolina. However, again, at least as to state contracts, the rules regarding suits by contractors and subcontractors have been codified by the legislature.

As mentioned under the previous discussion concerning the dismissal by the CPOC, we find it very persuasive that the settlement agreement between USC and Kahn recognized the claims of subcontractors and clearly said they may be pursued against USC in Kahn's name.[1] By signing and affirming the settlement agreement, USC and Kahn confirmed and represented that the ACM is a real party in interest in this case. Following the settlement and release of Kahn, ACM was the only party with interest in the claims against USC.

In its brief before us, USC says it knew about ACM's claims of $228,000, that it settled the case with Kahn in full with that knowledge and then the claim by ACM drastically increased. However, the law as to whether a claim can be made does not change based on how much the claim was when it was recognized in its settlement agreement. USC expected ACM's claim, but did not expect it to be as high as it was. However, this goes to the merits of ACM's claims and not ACM's ability to bring it. We make no judgment on the value or merits of the claims. Our holding is that the dismissal by the CPO on procedural grounds and then the further granting of summary judgment was not warranted by the facts in this case.

ORDER

Based on the foregoing Finding of Fact and Conclusions of Law, this Panel concludes that the CPOC should not have dismissed ACM for lack of subject matter jurisdiction. Further, summary judgment should not have granted to USC. Therefore,

IT IS HEREBY ORDERED that the order of the CPOC dated April 21, 2003, is

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1 Based on our interpretation of §11-35-4230, it was not necessary that the claim be brought in Kahn's name.

REVERSED and the matter is remanded to the CPOC for a hearing.

IT IS SO ORDERED.

South Carolina Procurement Review Panel

Willie D. Franks
Vice Chairman

This 16th day of October, 2003